Date of repeal of Kedah Limitation Enactment

18.2.53 = 4.6.72 (Muslim calendar)

14 years plus 8 days

Commencement of Limitation Ordinance, 1953

19.2.53

Date of Summons-in-Chambers

11.2.59 6 years minus 8 days

Total period = 20 years

Deduct Moratorium period:

Commencement

1.1.42 = 13.12.60 (Muslim calendar)

Moratorium lifted

13.9.49 = 8.12.68 (Muslim calendar)

Moratorium period 8 years minus 5 days

20 years less 8 years minus 5 days

= 12 years plus 5 days

The summons-in-chambers was therefore barred by limitation, and on this ground also the appeal must be allowed.

I would allow the appeal and set aside the order of the learned Judge dated 24th October, 1959, on summons-in-chambers dated the 11th February, 1959, with costs, including the costs of the summons-in-chambers to the appellant.

Appeal allowed.

Solicitors: *G. H. Goh; Natha Singh & Subbiah.*

HASSAN & ANOR. v. WAN ISHAK & ORS.

[C. A. (Thomson C.J., Syed Sheh Barakbah and Azmi JJ.) September 25, 1960]

[Kota Bharu — F.M. Civil Appeal No. 47 of 1960]

Defamation — Defamatory words in language other than that of the Court — Pleadings.

As a matter of practice when defamatory words are alleged to have been spoken in a language other than the language of the Court these words should be set out in their original form in the pleadings and in addition a translation of them into the language of the Court should be pleaded.

In this case the words complained of were spoken in Malay, but in their statement of claim those words were set out in English. The defendants did not take the point, but denied that they at any time said anything at all about the plaintiffs or either of them. On the issue of credibility the Court below found in favour of the plaintiffs, and awarded damages $750 and costs. On appeal the defendants took the technical point that the precise words of the alleged slander as proved at the trial were not set out in the Statement of Claim.

Held: (1) the point was not only highly technical, but also was devoid of merit. Being raised for the first time on appeal the Court had doubts as to the propriety of allowing it to be thus raised;

(2) although the actual words used in the language in which they were used should have been pleaded the failure to do so could not be held to have been fatal to the case of the plaintiffs. At the trial it was sufficient to prove words that were substantially the same.

Observations on the functions of Judge as trier of both fact and law.

Cases referred to:—

(1) *Bradlaugh* v. *The Queen* 3 Q.B.D. 607.

(2) *Harris* v. *Warre* 4 C.P.D. 125, 128.

(3) *Tournier* v. *National Provincial Bank* [1924] 1 K.B. 461; [1923] All E.R. Rep. 550.

COURT OF APPEAL.

H. Y. Teh for the appellants.

F. C. Arulanandom for the respondents.

Thomson C.J. (delivering oral judgment): This is an appeal from a decision of Hepworth J. whereby he gave the present respondents judgment against the present appellants for defamation.

In their Statement of Claim the plaintiffs said that the defendants spoke certain words of them which were alleged to be defamatory. These words were set out in the English language.

At the close of the plaintiffs' case it was clear that if any words were spoken by the defendants of the plaintiffs these words were not spoken in the English language but were spoken in the Malay language although it is clear that the sense of the Malay words as sworn to by the plaintiffs' witnesses was substantially the same as the sense of the English words that were pleaded.

I pause here to observe that at the trial, assuming no point to have been taken by the defendants earlier by way of demurrer, it would have been wise for the plaintiffs to have amended their Statement of Claim. They did not do so, however, and the trial proceeded. Here, however, it must be borne in mind that the defence as originally pleaded and persisted in and supported by the evidence of the defendants themselves and their witnesses was *non facit*. They did not allege they used words of the plaintiffs other than the words pleaded or other than the words spoken to in evidence by the plaintiffs' witnesses. They did not plead nor did they say that any words they did use of the plaintiffs were incapable of a defamatory meaning. What they did say was that they never at any time said anything at all about the plaintiffs or either of them.

On the issue of credibility thus raised the learned trial Judge found in favour of the plaintiffs. He found that the defendants did utter the words which were sworn to by the plaintiffs' witnesses. He took the view, with which we do not quarrel, that these words were clearly defamatory. He took the view that it was a case for substantial but not unduly heavy damages and he laid the damages at $750 and gave costs on the High Court scale.

Against that decision the defendants have now appealed and their appeal is based on the single highly technical point that the precise words of the alleged slander as proved at the trial were not set out in the Statement of Claim.

In my view this point is not only highly technical, it is devoid of merit and with great respect

has implicit in it a certain confusion of thought. Moreover, it is raised for the first time before us and I have grave doubts as to the propriety of allowing it to be thus raised.

As a matter of practice when defamatory words are alleged to have been spoken in a language other than the language of the Court these words should be set out in their original form in the pleadings and in addition a translation of them into the language of the Court should be pleaded. Admittedly that was not done here but, again, admittedly the point that it was not done was never raised at any stage of the interlocutory proceedings or of the trial.

But although in my view the actual words used in the language in which they were used should have been pleaded the failure to do so cannot be held to have been fatal to the case of the respondents.

It is true that in the case of *Bradlaugh* v. *The Queen*[1] it was held that in an indictment for publishing an obscene book it is not sufficient to describe the book as obscene but that the actual words alleged to be obscene must be set out and if they are omitted the failure to set them out will not be cured by a verdict of guilty.

There is no question that that case so far as it goes must be followed. It does not, however, follow from that case that in order to succeed the plaintiff must prove up to the hilt every word of the defamatory utterance as set out in his Statement of Claim. It is sufficient if he proves the substance of it.

Whatever may have been the case at one time there is no doubt as to the present state of the law.

In the case of *Harris* v. *Warre*[2] Lord Coleridge C.J., said this:—

"In libel and slander everything may turn on the form of words, and in olden days plaintiffs constantly failed from small and even unimportant variance between the words of the libel or slander set out in the declaration and the proof of them. For a long time it has been held to be enough to prove the substance of the words alleged in the declaration but if there was difference between both the form and substance of the words alleged, and of the words proved, the defendant was entitled to succeed."

Then in the case of *Tournier* v. *National Provincial Bank*[3] the matter was put thus. Bankes L.J. said (at p. 469):—

"The strictness of the old rule in reference to variance between proof and pleading in actions of libel and slander has long ago disappeared. It is still necessary to plead the exact anguage complained of, but proof of language substantially the same as that pleaded is admissible and should be submitted to the jury."

He then went on to quote the passage which has just been quoted from the judgment of Lord Coleridge in *Harris* v. *Warre* and went on:

"Every case must depend upon its own circumstances, and no rule can be laid down as to what constitutes a substantial difference."

Then Scrutton L.J. said (at p. 478):—

"But I think modern practice is, as stated by Lord Coleridge in *Harris* v. *Warre*, that it is enough to prove the substance of the words alleged, or I would add, of a material and defamatory part of them."

Finally Atkin L.J. said (at p. 487):—

"It is also, I think, clear that the plaintiff was entitled to put before the jury his case that the words proved, though not the very words pleaded, were words substantially to the same effect. Whether this be done by amending the pleading, by framing the question to the jury so as to raise the point, or by directing the jury that the words pleaded would be proved by proof of words substantially to the same effect, seems to me immaterial. No slander of any complexity could ever be proved if the *ipsissima verba* of the pleading had to be established."

The law in this connection is summarised in two passages from well-known textbooks. In *Halsbury's Laws of England* (3rd Edition, Volume 24 at p. 90) we read:—

"In order that the statement complained of as being a libel or slander may be construed or interpreted, it is essential that the actual words, and not merely their substance, should be set forth verbatim in the statement of claim or indictment. At one time proof of the actual words pleaded was regarded as essential, but the strictness of the old rule as to variance has long ago disappeared, and now proof of language substantially the same as that pleaded is admissible and should be submitted to the jury, with the direction that they must consider whether the words are defamatory with reference only to the version of the conversation which they accept."

Again the following passage is to be found in *Gatley* on "Libel and Slander" (4th Ed. p. 561):—

"In actions of slander, and in actions of libel where the oral evidence of witnesses is the only proof available, though precise words must be alleged in the statement of claim, it is no longer necessary for the plaintiff to prove that these precise words were in fact published. It is sufficient if he proves a material and defamatory part of them or words which are substantially to the same effect. In such a case, if the words proved convey to the mind of a reasonable man practically the same meaning as the words set out, the variance will be immaterial."

I would only add a word or two of my own. The law relating to libel and slander, perhaps more than other parts of the law, has been influenced by the distinction between the functions of the Judge and those of the jury. In an action for libel or slander the questions of whether the words complained of were spoken and whether they were in fact defamatory are questions of fact for the jury, but the question of whether the words complained of are capable of bearing a defamatory meaning is a question of law for the Judge. As the old rhyme has it:—

"Twelve honest men shall be judge of our cause
They are judges of fact but not judges of law."

In England the different functions of the Judge and the jury necessarily require the plaintiff to set out his version of the words complained of because the Judge has to rule at some stage or another whether or not these words are capable of a defamatory meaning. If he holds that they are not capable of such a meaning that is the end of the matter. But if he holds they are capable of such a meaning then it is for the jury to say whether in fact the words were spoken and whether in fact they bore such a meaning. And the position is the same here where the Judge is trier both of law and of fact. It is not sufficient to allege that defamatory words were used, the words themselves must be pleaded. But at the trial it is sufficient to prove words that are substantially the same. On this view there is no conflict between *Bradlaugh's* case, *supra*, and the

cases of *Harris* v. *Warre, supra,* and *Tournier, supra.*

In the present case in my view the words which were proved to have been spoken by the defendants were substantially the same as the words alleged in the Statement of Claim and I am confirmed in that view by the opinions of my brethren who are much more familiar with the Malay language than I am. Moreover there has been no question of injustice because the defence had nothing to do with the precise words used; it was a complete denial of using any words.

In the circumstances I would dismiss the appeal with costs.

Syed Sheh Barakbah J.: I entirely agree with the judgment which the learned President has just delivered and have nothing to add.

Azmi J.: I concur with the conclusions reached by the President of the Court that this appeal should be dismissed with costs and have nothing to add.

Appeal dismissed.

Solicitors: *M. N. Cumarasami; Braddell & Ramani.*

PUBLIC PROSECUTOR v. TEH KHIAN LONG

[A. Cr. J. (Thomson C.J.) October 14, 1960]

[K. L. — Selangor Criminal Appeal No. 56 of 1960]

Road Traffic — Notice of intended prosecution — Offence set out in charge differs from that in notice — Road Traffic Ordinance, 1958, s.56.

The provision of section 56 of the Road Traffic Ordinance that a notice of intended prosecution should be served on the accused is mandatory but the provision with regard to the specification of the time of the alleged offence is only directory. The purpose of the notice was to call the accused's attention to the fact that he was to be prosecuted while the circumstances were still fresh in his mind. If the purpose was fulfilled an incorrect statement as to the time of the accident did not invalidate the notice.

Case referred to:—

(1) *Pope* v. *Clarke* [1953] 2 All E.R. 704; [1953] 1 W.L.R. 1060; 37 Cr. App. R. 141.

CRIMINAL APPEAL.

Syed Othman bin Ali (Deputy Public Prosecutor) for the appellant.

Khoo Eng Chin for the respondent.

Thomson C.J. (delivering oral judgment): This appellant was prosecuted in the Magistrate's Court at Kuala Lumpur for driving a motor-cycle without due care and attention in contravention of section 36(1) of the Road Traffic Ordinance.

The charge alleged that the offence in question was committed on 9th November, 1959, at about 5.50 p.m. in Jalan Raja, Kuala Lumpur.

On 21st November, 1959, a notice under section 56 of the Road Traffic Ordinance had been addressed to the respondent to the effect that he had been involved in an accident at 6 p.m. on 8th November in Jalan Raja, Kuala Lumpur, and that consideration was being given to the facts with a view to prosecuting him for dangerous driving or driving without due care and attention.

It is admitted that that notice was sent to him by registered post within the statutory period of 14 days.

On the summons being called, counsel for the respondent took the preliminary point that the charge was bad because the offence set out in the charge was not the same as the offence set out in the notice served under section 56. In the case of the charge it was alleged that the offence took place at 5.50 p.m. on 9th November whereas the notice was in respect of an offence committed at about 6 p.m. on 8th November. The Magistrate accepted this submission and dismissed the summons.

In my opinion the Magistrate was wrong but I hasten to add that the responsibility for his error rests upon the prosecution who failed to bring to his notice the case of *Pope* v. *Clarke*[1]. Had that case been brought to his notice it is very unlikely he would have dismissed the summons.

In that case, which deals with the provisions of section 21(c) of the United Kingdom Road Traffic Act, 1930, which correspond to those of section 56 of our Road Traffic Ordinance, it was held by a very strong Divisional Court including Lord Goddard and the present Chief Justice, Lord Parker that the provision of section 21(c) of the Road Traffic Act that a notice of intended prosecution should be served on the defendant is mandatory but the provision with regard to the specification of the time of the alleged offence is only directory. The purpose of the notice was to call the respondent's attention to the fact that he was to be prosecuted while the circumstances were still fresh in his mind. If that purpose was fulfilled an incorrect statement as to the time of the accident did not invalidate the notice.

What was said in that case was, to my mind, clearly applicable here. It is true that here there was a discrepancy both as to the date and as to the time. The discrepancy as to the date, however, was of one day only and in the absence of any knowledge whatsoever of the circumstances of the case the Magistrate was not in a position to form any opinion as to whether the defendant could have been prejudiced in any way. If it had transpired at the end of the trial that the defendant had been involved in two accidents on two successive evenings in Jalan Raja, then the discrepancy between the charge and the notice would have called for very very careful examination with a view to ascertaining whether the defendant could have been in any way prejudiced. But until that position arose the discrepancy was so small that the Magistrate to my mind should have brushed the point aside on the ground that the mandatory part of the section had been complied with.

The appeal is allowed and the order of discharge set aside.

Appeal allowed.